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In the

Supreme Court of the United States

OCTOBER TERM, 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a New York corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the district court is reported at 392 F.Supp. 1110 (E.D. Mich. 1974). The action of the Court of Appeals is reported at 513 F. 2nd 630 (6th Cir. 1975). Both decisions are included in the Appendix at (56a) and (62a) respectively.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 23, 1975 (62a). The jurisdiction of

this Court is invoked under 28 U.S.C. 1254(1) providing for jurisdiction on writ of certiorari granted to persons appealing from the decision of a United States Court of Appeal. The petition was granted on October 6, 1975.

QUESTION PRESENTED

Should antitrust immunity under the State action exemption be granted to a private business activity because it is referred to in a rate schedule when there is no legislative imperative nor evidence that a regulatory agency considered the practice?

STATUTES INVOLVED

Act of Congress July 2, 1890, Sherman Act c. 647 (26 Stat. 209) Sec. 1, 2 (15 U.S.C. Sec. 1, 2)

Act of Congress Oct. 15, 1914, Clayton Act c. 323, Sec. 4 Part I Stat. 730, Sec. 4 (15 U.S.C. Sec. 14)

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STATEMENT OF THE CASE

A. *Proceeding below.*

Lawrence Cantor, owner of a retail drug store in Detroit, Michigan, filed this antitrust action on July 6, 1973, seeking treble damages and appropriate injunctive relief in the Eastern District of Michigan, Southern Division (2a). Jurisdiction was based upon 28 U.S.C. Sec. 1337, which confers original jurisdiction on the federal district courts with respect to federal civil actions arising under an Act of Congress protecting trade and commerce against restraints and monopolies. Cantor alleges that all retailers of light bulbs have been damaged by Detroit Edison's

(hereinafter Edison) illegally tying the purchase of light bulbs to the purchase of electrical energy by residential customers, and the consequent total monopolization of the retail light bulb market in the area serviced by Edison. This tying arrangement is alleged to constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, an attempt to monopolize and monopolization under Section 2 of the Sherman Act, 15 U.S.C. Sec. 2, and an illegal exclusive dealing arrangement under Section 3 of the Clayton Act, 15 U.S.C. Sec. 14. Edison filed its Answer (21a) and Motion for Summary Judgment (24a). The motion claimed (1) that Edison's light bulb distribution program was exempt from the federal antitrust laws under the state action doctrine announced by the Supreme Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), because there is a reference to the light bulb program in Edison's rate schedule[1] for electricity approved by the Michigan Public Service Commission (hereinafter the MPSC) and (2) that the program did not violate the antitrust laws. On January 11, 1974, the parties entered into a stipulation severing the issues to permit the District Court to determine the validity of Edison's state action exemption claim (48a). The Honorable Judge John Feikens granted Edison's motion for summary judgment in a memorandum opinion dated

[1] The word "tariff" used in Cantor's Petition for a Writ of Certiorari refers to the "Schedule of Rates Governing the Sale of Electric Service" attached to Plaintiff's Complaint as exhibits. It is the apparent approval of this document and its antecedents that Edison argues is the act of the sovereign which exempts its light bulb program from the antitrust laws. This brief will refer to Edison's 1972 "Schedule of Rates Governing the Sale of Electric Service" and its antecedents as rate schedules.

July 2, 1974 (56a) and issued his order on August 21, 1974 (60a). The Circuit Court of Appeals for the Sixth Circuit on April 23, 1975 affirmed Judge Feikens by adopting his opinion in an abbreviated memorandum (62a).

B. *Statement of Facts*

1. *The Program and its purpose.* Edison's light bulb program entitles a residential customer to one light bulb for every permanent light fixture at the time that the customer's residence is first connected to its lines and thereafter to replacements for "approved" burned-out light bulbs. (214a). The most commonly used sizes are available in the program. (30a). A charge for light bulbs is included in the residential electric service rate and is paid by residential customers whether or not they utilize Edison's light bulb program. (26a, 103a, 111a). Edison distributes light bulbs through Company owned service centers and approximately fifty private agents it employs in its market territory. (192a).

The program began in 1886, when the Detroit Illuminating Co., the predecessor of Detroit Edison began to distribute light bulbs to its customers (26a) and it has continued without interruption until the present day. According to affidavits submitted in support of Edison's Motion for Summary Judgment, the original purpose of the program was "the encouragement of the use of incandescent lamps so as to ultimately encourage the use of electricity in the homes, offices and businesses of Detroit Edison customers" (26a, 29a).

Further, the distribution program appears to have its origins in Edison's desire to compete against gas illuminating companies. (29a) The purpose today remains substantially the same, to "keep the sockets full" (163a) and, according to an independent survey, provide Edison with revenues "considerably above average," and raise wattage on lamps used. (292a)

2. *The regulatory scheme.* Under the Constitution of the State of Michigan since 1908, Edison's right to produce, transmit and sell electricity is derived from each municipality in which it operates, not from the State of Michigan. These rights are contained in long-term contracts between Edison and the various municipalities called "franchises". (53a). The franchises do not provide for the light bulb program (164a) Edison has received no certificate of convenience or necessity or similar right from the State of Michigan. (3a para. 2 compare with 21a para. 2, 52a-53a)

The first interest of the state in electric utilities began in 1909, when the Michigan legislature adopted the Transmission of Electricity Act (MCLA 460.551, et seq.)[2] and assigned to the Michigan Railroad Commission the authority for ". . . control and supervision of the business of transmitting and supplying electricity. . ." (MCLA 460.552) and setting ". . . the rate of charge to be made for the electricity so transmitted. . .", (MCLA 460.-551). The law provides that the municipalities retain control of their streets and highways (MCLA 460.553) and that the Commission can not override rates established by

[2] All citations to Michigan statutes are cited to Michigan Compiled Laws Annotated and designated as MCLA herein. The particular Chapter involved is Chapter 460, which deals with public utilities. Relevant sections are fully set out in the Statutory Appendix.

municipal franchises (MCLA 460.557). In 1919, the Michigan Railway Commission was abolished and its functions transferred to the newly created Michigan Public Utilities Commission (MCLA 460.551 et seq.). In 1939, the MPSC was created and had transferred intact to it the powers and authorities of the Michigan Public Utilities Commission (MCLA 460.1, 460.4).

The business of distributing light bulbs is not referred to in the Constitution or the regulatory scheme of the state of Michigan. However, a reference to the light bulb program has been included in all of the rate schedules which Edison has since 1916, submitted to the MPSC or its predecessors from time to time. See examples at (214a, 260a, 264a, 269a) The description of the program in the rate schedules over the years has not varied substantially. Following is the verbiage used in more recent years to describe the light bulb program:

> "B-5.5 Lamp Supply: incandescent lamps will be furnished without extra charge:
>
> (1) To residence connected for the first time to the Company's lines, in such quantities as may be needed for all permanent fixtures.
>
> (2) As replacements of approved burned out lamps in proportion to the use of energy for lighting purposes under the applicable rate." (214a).

3. *The lack of regulatory inquiry.* The MPSC has a duty "to make full investigations" on matters of rates and regulations, MCLA 460.54. Despite the MPSC's statutory duty, Edison has produced no evidence of a regulatory hearing or investigation of its bulb program. In particular, Edison has no records of any testimony or other evidence being presented

to the MPSC or its predecessors with respect to the bulb program. (50a-52a, 110a-115a, 126a, 128a, 132a, 145a-146a, 149a, 156a-160a, 164a).

Edison has never submitted to the Commission or its predecessors, nor have these agencies ever requested submission of evidence concerning the types, number, or cost of light bulbs utilized in the program compared to those on the open market. (157a).

No evidence exists which indicates that any Michigan regulatory agency has considered the effect of the bulb program on competition. (157a).

No regulatory proceedings have been held to determine lumens, hour life, wattage, safety, or other bulb specifications, even though Edison's bulbs, which are made to its specifications, provide less light for the electricity used than commercially available bulbs. (324a, compare 325a, 33a, 112a, 113a, 157a-158a).

Edison in the past has tested, and today requires its vendors to test bulbs as to lumens, wattage, and hour life. These test results have not been filed with, requested by, or reported to the MPSC or its predecessors. (85a-86a, 156a).

No proceedings have been held to determine the bulb quantities that should be made available to each residential customer. (112a).

Although the rate schedule refers to "approved" bulbs, there have been no regulatory proceedings in which the selection of any bulb was approved or disapproved by the MPSC. (159a-164a). For example, changes in wattage of the light bulbs furnished from 40 to 50, and later from 50 to 60—have been made without the approval or even knowledge of the MPSC. (160a).

The method of physically distributing light bulbs has never been considered by a regulatory body, even though Edison ceased home delivery in 1954 (29a, 164a). No consideration has ever been given to the method of selecting agents or to the physical location or accessibility of bulb offices or of its agents. (114a).

No hearings have been held or inquiries made to develop regulations, procedures, or rules for the program, and Edison's own extensive rules concerning the operation of the bulb program (196a) have never been considered in regulatory hearings. (146a-147a, 164a, 50a-52a).

No regulatory proceedings have been held to determine the type of light bulbs that are available, e.g., incandescent, fluorescent, etc. (109a-111a).

No hearings have been held concerning Edison's advertising of the bulb program. (114a-115a, 145a-147a). And so, Edison has without restraint in brochures and placards described the program as free or as an exchange.[3] (270a-275a)

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[3] The program is neither free nor an exchange. The earliest available advertising material uses these misleading terms. (270a-275a). Since approximately 1967 Edison has inaccurately described the program similarly in a welcoming letter to new customers. (272a). All of Edison's light bulb distribution centers—the places where Edison's customers obtain bulbs—display placards describing the program as "free" or as an "exchange". (275a). In fact, Edison purchases the bulbs expressly for resale and presumably escapes paying Michigan sales taxes as a result. See the purchase orders to manufacturers wherein Edison describes the bulbs as purchased for resale. (275a). Edison Executive Vice President for Marketing George Lahodny stated that bulbs received in exchange are destroyed, that no value is assigned to them by Edison (143a) and that the program is financed by revenue derived from rates. (145a).

Edison conducted extensive surveys in 1955, and again in 1970, which included its customers' usage and non-usage of the lamp program. These survey results were apparently not requested by, filed with, nor reported to the MPSC. (161a).

During oral argument in the District Court on Edison's motion for summary judgment, Judge Feikens acknowledged there had been no review of the program after a discussion between both sides and the court. The judge inquired if there had been any regulation or inquiry into the program and Edison counsel admitted:

> "*Mr. Cohen*: Only to a limited extent in 1964. I believe we wished to make some change in our tariff insofar as commercial users were concerned. In other words, to cut commercial users out of the tariff and to that extent there was a kind of limited state activity which determined whether or not we are entitled to do that, or whether or not we shouldn't be allowed to do that." (161a).

Responding, Mr. Sklar (one of Cantor's counsel):

> "I would contend that the Michigan Public Service Commission had not exercised considered judgment and did nothing, and at least there is no evidence on the record today that the Michigan Public Service Commission did anything." (179a).

The Court concluded the discussion by saying:

> "*The Court*: Well, that is true, there is nothing here yet, but Mr. Cohen suggests that he wants to supplement what he has in his paper with some testimony here. . . ." (179a).

Edison, to date, has produced no additional evidence since this characterization of the record by the trial court.

C. The Decisions Below.

1. The Opinion of the District Court.

Judge Feikens' order granting Edison's Motion for Summary Judgment occurred prior to the Supreme Court's decision in *Goldfarb* v. *Virginia State Bar Association, et al.*, Slip. Op. 74-70, —— U.S.——, 95 S.Ct. 2004 (Decided 6/16/75) and rests upon an incorrect view of this Court's holding in *Parker* v. *Brown*. In granting Edison's motion, Judge Feikens stated that the affirmative action of the MPSC in approving Edison's rate structure, which included reference to the light bulb program, and the Commission's continuing supervisory power over Edison, "put this case squarely within the *Parker* doctrine" (59a). As the determinative principle of law, Judge Feikens held: "If (Edison's) action were occasioned by adherence to the rules and regulations of its operative tariffs then it is shielded from liability for any possible antitrust violation". (58a).

The holding appears to stand for the proposition that rate schedules approved by regulatory agencies give antitrust immunity to covered practices without regard for the depth of consideration or for the subject matter of the activity under attack.

Judge Feikens noted that Edison's rate schedules were derived after Edison ". . . furnished the Commission with data including information on the free light bulb exchange program. . . ." (59a) The only data to which Judge Feikens could be referring is a two line entry of bulb costs supplied in pencilled work sheets which Edison made available to MPSC auditors in 1972 which Edison's rate n aking officer admitted were part of voluminous documents, (125a-131a, 320a). Judge Feikens further

declared that "Neither statute, case law nor common sense requires the state to scrutinize each small facet of a comprehensive scheme for its effect on competition." (60a).

2. The Opinion of the Court of Appeals.

Since the Court of Appeals adopted Judge Feikens opinion, no further comment is necessary.

SUMMARY OF ARGUMENT

There are a multiplicity of reasons why the sovereignty of the State of Michigan is not involved in creating and maintaining Edison's light bulb program. Reversing the district court and the Court of Appeals here for any one of the reasons suggested will not impose upon the sovereignty of the State of Michigan or the principles of dual sovereignty within our federal system.

The antitrust laws, and in particular, the Sherman Act, are the Magna Carta of economic legislation in the United States and are as important to economic freedom as the Bill of Rights is to the protection of our fundamental personal freedoms. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). Immunity from the antitrust laws is sparingly granted and no exception is made for public utilities. *Otter Tail Power Company* v. *U.S.*, 410 U.S. 366 (1973). One exception permits State governments acting in their sovereign capacity through their officers or agents to engage in certain activities, even if anticompetitive, in order to promote the legitimate interests of the State. Thus, the Supreme Court permitted an antitrust exemption to the State of California where the State, by statute, established and participated in a crop limitation, price restriction and crop marketing program,

Parker v. *Brown*, 317 U.S. 341 (1943), and to a program of the State of Texas, which established elaborate controls over the business of pilotage and which made harbor pilots agents of the State, *Olsen* v. *Smith*, 195 U.S. 332, 340 (1904). The Court has denied exemptions to conduct which is essentially private in nature even though it may be authorized by the State, *Northern Securities Company* v. *United States*, 193 U.S. 197 (1904), prompted by a public agency, *Goldfarb* v. *Virginia State Bar Association, et al.*, Slip. op. No. 74-70 decided June 16, 1975, —— U.S. ——, 95 S. Ct. 2004, or even when commanded by State legislation, *Schwegmann Brothers et al.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

Perhaps there may be some private business activities which for fundamental public policy reasons are entitled to antitrust exemptions when commanded by the State. Edison's light bulb program, a purely private business activity whose chief purpose has been to increase use of electricity, is not such an activity.

The brief reference in Edison's rate schedule to the light bulb program, even if the rate schedule has been approved pursuant to order of the MPSC, is not a basis for escaping the antitrust laws. There is no legislative mandate for the practice in Michigan. In fact, only Edison's "utility" activities are subject to MPSC regulation, i.e.,

> ". . . owning, . . . operating . . . facilities for producing, generating, transmitting, delivering or furnishing . . . electricity . . . for the public for compensation." MCLA 460.501.

Light bulb distribution is not one of those activities.

Despite the MPSC's statutory duty to ". . . make full investigation of all matters . . . submitted. . .", (MCLA

460.54), there is no evidence of regulatory consideration of any aspect of the program. Absent regulation, there is no basis for finding sovereign command.

Under Michigan's Constitution and its Supreme Court decisions, municipalities in Michigan, not the MPSC, are the repository of sovereign power over electric utilities. Orders of the MPSC, absent some express statutory mandate, and perhaps not even then, are not entitled to the weight accorded sovereign commands.

Accordingly, Cantor respectfully requests this Court to reverse the opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the decision of the trial court below, and remand this case to the District Court for further proceedings on the remaining issues.

ARGUMENT

I.

ANTITRUST EXEMPTIONS ARE ONLY GRANTED TO A STATE OR ITS OFFICERS OR AGENTS WHO ACT IN FURTHERANCE OF SOME STATE GOAL IN ACCORDANCE WITH A STATUTE. EDISON'S LIGHT BULB PROGRAM IS A PRIVATE BUSINESS ACTIVITY, HAS NONE OF THESE CHARACTERISTICS AND IS NOT ENTITLED TO EXEMPTION.

Exemptions from the antitrust laws by implication are strongly disfavored, see *e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348 (1963), because competition is our fundamental national economic policy, see *e.g., Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4 (1958). Edison is a privately owned utility. Investor owned utilities like any other private business are subject to the antitrust laws, *Otter Tail Power Company* v. *U. S.,* 410 U.S. 366 (1973).

Edison claims its practice of tying the sale of light bulbs to the sale of electricity is exempt under this Court's holding in *Parker* v. *Brown,* 317 U.S. 341 (1943). This Court has exempted only those activities in which the State, through its officers or agents, engage in furtherance of State business. In this case, the program is private business, initiated and carried out by private enterprise. Activities of private persons, whether "authorized", "prompted", or in some cases even when "commanded", have consistently been held not exempt from antitrust enforcement.

This Court's most recent analysis of the rights of States to regulate private business in derogation of the antitrust law is contained in *Goldfarb* v. *Virginia State Bar Association, et al.,* Slip op. No. 74-70 decided June 16, 1975. —— U.S. ——, 95 S.Ct. 2004. The activity complained of was the establishment of minimum fee schedules for private attorneys by the Virginia State Bar Association and the Fairfax County Bar Association. This Court decided that the activity of the defendants was "essentially a private anticompetitive activity, and in that posture cannot claim it is beyond reach of the Sherman Act." *Goldfarb* v. *Virginia State Bar Association, et al.,* Slip op. at page 18, decided June 16, 1975, —— U.S. ——, 95 S. Ct. 2004. Chief Justice Burger also stated:

> "The threshold inquiry in determining if anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign . . . It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.
>
> "The fact that the State Bar is a state agency for some limited purposes does not create a antitrust shield that allows to foster anticompetitive practices for the benefit of its members." Slip op. at p. 16.

The Court held the activity not exempt, despite a record which revealed substantial involvement of State agencies coupled with the power to penalize noncompliance. The Court noted:

> "Enforcement has been provided by respondent Virginia State Bar, which is the administrative agency through which the Virginia Supreme Court regulates

> the practice of law in that state; membership in the State Bar is required in order to practice in Virginia, of course. Although the State Bar has never taken formal disciplinary action to compel adherence to any fee schedule, it has published reports condoning fee schedules, and has issued two ethical opinions indicating fee schedules cannot be ignored. The most recent opinion states that 'evidence that an attorney habitually charges less than the suggested minmum fee schedule adopted by his local bar association raises a presumption that such lawyer is guilty of misconduct. . .'" Slip. op. at pp. 2, 3, 4

The Court in *Goldfarb* relied on *Parker* v. *Brown,* 317 U.S. 341 (1943) and *Olsen* v. *Smith,* 195 U.S. 332 (1904) for its decision. These three cases, taken together, highlight two necessary requirements for antitrust immunity. First, that the State's participation in the activity under attack must be pervasive, and, secondly, the business must be one in which the sovereign has a legitimate interest. The decisions in *Parker* v. *Brown,* and *Olsen* v. *Smith,* upon which this Court relied in *Goldfarb* upheld exemptions because both requirements were satisfied.

In *Parker* v. *Brown,* the Supreme Court held that a state created and enforced program for 1) limiting production, 2) setting prices, and 3) controlling marketing of raisins, established in accordance with California Agricultural Prorate Act was immune from challenge under the antitrust laws. The Prorate Act established a commission to adopt controlled growing and marketing arrangements for agricultural products. The commission was appointed by the governor and confirmed by the State senate.

In order to establish this threefold program for a particular agricultural product the California Act required a petition by at least ten producers followed by a public hearing and findings by the Commission that the institution of the program would "conserve agricultural wealth and prevent agricultural waste without causing unreasonable producer profits." *Parker* v. *Brown,* 317 U.S. 341, 346 (1943). A prorate committee for that crop then was appointed by the Commission and directed to develop a program for the particular crop. Following another hearing, the Commission had to approve this program by finding that it was "reasonably calculated to carry out the objectives of the Act." 317 U.S. 341, 347.

After a vote by growers, the raisin prorate program was adopted under this procedure.[4] Not only did the State create the program for raisins, but its agents following the rules and procedures set forth in the statute actively participated in marketing.[5]

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[4] An approved plan could not be implemented until consented to by 65 percent in number of the producers in an affected zone owning at least 51 percent of the acreage devoted to production of the regulated crop, 317 U.S. 341, 346-47.

[5] All raisins had to be delivered to receiving stations for grading. All the "sub-standard," but edible, raisins and 20 percent of the "standard" raisins were placed into a "surplus pool." Fifty percent of the "standard" raisins were placed in a "stabilization pool." The producers were paid specified advances for raisins delivered into the "surplus" and "stabilization" pools. The prorate committee undertook to market the raisins in each of the pools in accordance with certain rules, and to pay over to each producer his pro rata share of the proceeds. The remaining 30 percent of the standard raisins were not taken by the committee and could be sold by the producers themselves, but only at such time as authorized by the committee. 317 U.S. 341, 347-48.

After reviewing appropriate legislative history and the purpose of the Sherman Act, the Court found the State's activity exempt from the antitrust laws because:

> "It is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the State and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. 341, 350-51.
>
> "It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of governmental policy." 317 U.S. 341, 352.

The Court in *Parker* clearly limited its decision.

> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-347, 48 L.Ed. 679, 698, 703, 704, 24 S.Ct. 436 (1904); and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." 317 U.S. 341, 352.

The Court did not address itself to the question of when the acts of private enterprise taken pursuant to

state authorization or approval are exempt because California was so clearly the initiator and actor in the pursuit of what was legitimate state business. The existence of a complimentary and supporting federal agricultural policy further eased the way for the court, if not, considering the times, compelling the result.[8]

It cannot be stressed enough that in *Parker* it was the State of California conducting legitimate State business who was the initiator, enforcer and principal actor in the program attacked. The officers and agents of the State were following precise and detailed legislation passed to deal with a serious local problem. Indeed, it was the Director of Agriculture and members of the Prorate Advisory Commission who were named as defendants in the action.

Olsen v. *Smith*, 195 U.S. 332 (1904) and *Lowenstein* v. *Evans*, 69 Fed. 908 (1895) are the two decisions relied on by the Court in *Parker* for the proposition that the Sherman Act does not restrain sovereign acts of State

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[8] Recent commentators have viewed the existence of complimentary federal policy as an integral and necessary part of the result in *Parker*. Thus, Court of Appeals for the District of Columbia has noted:

> "*Parker* v. *Brown* involves not just state governmental action; it involves regulatory action in the state's capacity as sovereign, and it involves sovereign state regulatory action which is consistent with federal national policy, i.e., the Agricultural Adjustment Act, enunciated by the national Congress, which is also the source of federal antitrust policy." *Hecht* v. *Pro-Football, Inc.*, 444 F. 2d 931, 937 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972).

See also Donnem, Federal Antitrust Law versus Anticompetitive State Regulation, 39 ABA Antitrust L.J. 950, 960. (1970).

governments. 317 U.S. 341, 352. Examination of these cases confirms that antitrust immunity is limited to activities in which only the State or its authorized agents engage mandated by the legislature for valid State policy reasons. In *Lowenstein,* the United States Court of Appeals refused to apply the Sherman Act to a state operated retail liquor monopoly. In *Olsen,* the State of Texas enacted a statute which licensed river and harbor pilots making them agents of the State. The statute provided that the governor was authorized to appoint for each port, whose population and circumstances warranted it, a five men board known as Commissions of Pilotage. The board was empowered to fix rates within a statutory maximum ". . . to be made by branch and deputy pilots for their services, to regulate the manner in which such pilots shall perform their duty, to examine them as to their qualifications to hear complaints made against them, and, if occasion requires, to suspend them until the governor shall act in the matter". *Olsen* v. *Smith,* 195 U.S. 332, 339, 340. The statute granted the Governor broad authority to appoint as many "branch pilots" as necessary, each of whom was to hold office for two years, subject to removal by the Governor. Only a duly commissioned branch pilot or deputy thereof could engage in the business of pilotage. The Court, in holding that this anticompetitive scheme did not conflict with federal antitrust law, concluded that the pilots were "duly authorized agents of the state . . . performing the duties devolving upon them by law". 195 U.S. 332, 345. Texas, as well as the national government, in 1904, had a substantial interest in pilotage. To attract foreign ships into local harbors it was necessary that competent pilots be available at reasonable rates and therefore, Texas saw fit to be totally involved in the business of pilotage making it the State's business.

As in *Goldfarb,* earlier decisions of this court denied a state action exemption to private business activities. In *Northern Securities Co.* v. *United States,* 193 U.S. 197 (1904), this Court considered the question of whether actions of a privately owned company operating pursuant to a state statute were within the scope of the Sherman Act. In *Northern Securities,* the Court considered legislation passed in New Jersey authorizing holding companies. The Northern Securities Co., was formed for the purpose of owning the stock of both the Great Northern Railway Co. and the Northern Pacific Railway Co. who had formerly been competitors. The formation and operation of the holding company— purely private acts—were deemed violations of the Sherman Act even though New Jersey had given its blessing to the formation of holding companies by statute and by chartering Northern Securities.

Many years later, in *Schwegmann Brothers, et al.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951), this Court once again had to decide the question of whether private business conduct compelled by state statute was exempt from the application of the Sherman Act. The Louisiana statute authorized enforcement of price fixing arrangements between manufacturers, distributors and retailers who agreed by contract to fix their prices and further authorized enforcement of such agreements on non-contracting retailers such as the defendant. Schwegmann had been cutting his retail prices on liquor contrary to the

statute authorizing enforcement of price fixing. Justice Douglas held that:

> "It should be noted in this connection that the Miller-Tyding Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker* v. *Brown*, 317 U.S. 341, 350." 341 U.S. 384, 389.

The foregoing review of Supreme Court cases dealing with the question of state action immunity from federal antitrust laws leads to the inescapable conclusion that this Court has never held private business activities to be exempt. This Court, favoring our antitrust policy, has uniformly refused to grant antitrust exemptions for private business activities even in the face of state compulsion. Consistent with this policy, the Court has stated:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedom." *United States* v. *Topco Associates Inc.*, 405 U.S., 596, 610 (1972).

Perhaps, when there is state compulsion of a private business activity in furtherance of some fundamental public policy, an exemption from the antitrust laws could be justified. Exemption for Edison's light bulb program — a public relations device intended to sell more electricity by keeping the sockets full — cannot be justified.

II.

EDISON'S BRIEF AND SUPERFICIAL REFERENCE TO ITS LIGHT BULB PROGRAM IN ITS ELECTRICITY RATE SCHEDULE DOES NOT PROVIDE A BASIS FOR OVERCOMING OUR NATIONAL POLICY FAVORING ANTITRUST ENFORCEMENT.

A. With virtually no knowledge about the light bulb program the MPSC cannot be said to have commanded the activity.

Parker v. *Brown* established the state action immunity doctrine on a record which demonstrated that State officials, acting under a specific State legislative mandate, had directed the controlled raisin marketing program after public hearings and specific findings that the program would conserve agricultural resources without unduly favoring raisin growers. The finding that the State's designated agents carefully considered the entire program including the growing, pricing and marketing restrictions proposed by the growers was central to the decision. See 317 U.S. 341, 347 (1943).

Despite a statutory duty to the contrary, the record in this case contains no evidence that either the MPSC or any of its predecessors have ever considered any aspect of the light bulb program. The MPSC has a duty "to make full investigation as to all matters" involving the fixing or determination of rates and charges or making of rules or conditions of service. MCLA 460.54

No description of the light bulb distribution program in any rate schedule prepared and submitted by Edison has ever been questioned by, or modified at the direction or request of the MPSC, although Edison has changed

the description from time to time, *e.g.*, compare (214a, 260a, 264a, 269a).

Edison has, without regulation over the years, among other activities in operating and maintaining the light bulb program used its own service centers and employed private distribution agents (114a, 192a) changed at will the size, type and number of bulbs available to customers (109a-111a, 157a) established extensive internal rules for administering the program (196a) determined itself that more costly longer life bulbs which produced less light for the same electricity as commercially available bulbs were "better" for itself and its customers (324a, 33a, 112a, 113a, 157a, 158a) and falsely described, both to its customers and in its rate sheets, the bulbs as "free" and the program as an "exchange" when in fact, a charge for bulbs is concealed within the electricity charge (272a-275a).[7] In sum, no evidence has been presented that the MPSC or its predecessors ever considered, reviewed, investigated or discussed any aspect of Edison's light bulb distribution program.

Surely, a command made in ignorance—even if it were the sovereign command of a state—cannot take precedence over the antitrust laws. An order entered in ignorance where a regulatory agency has a duty to investigate is not entitled to any weight. See *Colorado-Wyoming Gas Co.* v. *Federal Power Commission,* 324 U.S. 626 (1945); *In the Matter of the Application of*

[7] The facts, set out at pages 6-9 infra, detail more fully the matters which the MPSC has not reviewed.

Hawaiian Electric Company Inc. for Approval of Rate Increases and Revised Rate Schedules,—CCH Utilities Law Reporter—State para. 22,200 (Supreme Court of Hawaii No. 5374, decided May 7, 1975), *cf. Continental Ore* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 706 (1961).

The comments of the Supreme Court of Hawaii are particularly appropriate here. In setting aside a commission ordered promotional program designed to sell more electricity, the Court said:

> "It is not our intention to belabor the obvious, but the stark reality of the situation is that our energy problems and our environmental concerns are here to stay. In the face of dwindling oil supplies and spiralling costs, promotional practices which are wasteful or which only serve to fuel the energy crisis should be viewed by a regulatory agency with extreme caution." *In the Matter of the Application of Hawaiian Electric Company, Inc. for Approved Rate Increases and Revised Rate Schedule, supra,* at p. 50,488-9.

Where the MPSC has not even considered the program, there is certainly no justification for exempting Edison's energy-wasting lamp program.

The lower federal court decisions in the area of state action exemptions also support Cantor's contentions that regulatory review is necessary. In *Macom Products Corp.* v. *American Telephone and Telegraph Co.,* 359 F. Supp. 973 (C.D. Cal. 1973), the court considered the rate schedule adopting procedures of several states. The rate schedules under attack limited plaintiff's ability to sell equipment to interconnect with defendant telephone sys-

tem. The court denied an antitrust exemption, even in States where adversarial hearings took place, because there was no evidence that the agencies exercised considered judgment about the particular practice under attack. 359 F. Supp. 973, 977. In *Chastain, et al.* v. *American Telephone and Telegraph Co.*, Federal Court D.C., civil action No. 2088-70 filed October 1, 1975, 1975-2 CCH Trade Cases para. 60,519, the state action exemption was denied because, among other reasons, ". . . it cannot be assumed that the state agencies understood that the wording of the tariffs . . . " would result in the anticompetitive activity. 1975-2 CCH Trade Cases para. 60,519 at p. 67,299.

The District Court denied immunity in *Marnell* v. *United Parcel Service*, 260 F. Supp. 391, 410, 411 (N.D. Cal. 1966) because the agency had no knowledge of defendant's discriminatory contract rates. In *George R. Whitten, Jr. Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25 (1st Cir. 1970), cert. denied 400 U.S. 850, exemption was denied because there was no consideration by the state agency of the effect on competition. In *Woods Exploration and Producing Co.* v. *Aluminum Co. of America*, 438 F. 2d 1286 (5th Cir. 1971), cert. denied 404 U.S. 1047 (1972), the court refused an exemption to an agency order issued on false information. In *International Telephone and Telegraph Corp.* v. *General Telephone and Electrical Corp.*, 351 F. Supp. 1153 (D. Hawaii 1972) the court denied the state action defense because the agencies had not considered the anticompetitive effect of the mergers attacked. The concern of these courts about the inadequacy of the regulatory agency process is widely shared. See Farris

and Sampson, *Public Utilities Regulations, Management and Ownership*, pp. 161-167 (1974).[8]

The mainstream of authority which deals with the state action defense of an antitrust claim require a careful factual inquiry of the extensiveness and quality of the State regulation which is said to justify antitrust immunity. An analysis of the extent and quality of the MPSC's inquiry into Edison's light bulb program reveals that there has been no such inquiry. Accordingly, whatever action the MPSC may have taken should not be considered a sovereign command to overcome the antitrust laws.

B. The MPSC's limited authority precludes its regulation of the light bulb program.

MCLA 460.6 provides:

> "The Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all *public utilities* in the state except . . . *as otherwise restricted by law.*" (emphasis supplied)

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[8] The extent of concern about the inadequacies of the regulatory process has reached Congress. Several bills have recently been introduced in the House of Representatives which have as their object improving competition in the regulated industries through reform of the regulatory process. One Bill, H.R. 10171 introduced on October 8, 1975, 94th Cong., 1st Session, has been sponsored by eighteen Congressmen. The Bill seeks to establish a National Commision on Regulatory Reform. Another Bill, H.R. 10100, introduced on October 8, 1975, 94th Cong., 1st Session, specifically seeks: "To reform electric utility rate regulation, to provide for more effective planning of bulk power facilities, to assure reliability of bulk power supplies, to strengthen State electric utility regulatory agencies, and to establish the Federal Energy Commission."

To understand how the MPSC is "otherwise restricted by law" in regulating "public utilities" it is necessary to examine other relevant sections of MCLA Chapter 460 and applicable decisions of the Michigan Supreme Court.

1. In Michigan, Electric "public utilities" by definition produce, transmit, and sell electricity. The distribution of light bulbs is not one of these activities and is therefore not within the ambit of MPSC regulation.

Public utilities are defined in MCLA 460.501 as follows:

> "The term "public utility", when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation."

This definition should be given the same meaning in all places in the same statutory scheme unless a contrary intent is manifest. *Gonzales* v. *Barber,* 207 F.2d 398 (9th Cir. 1953), aff'd 347 U.S. 637; *Sampsell* v. *Straub,* 194 F.2d 228 (9th Cir. 1952), cert. den. 343 U.S. 927.

Michigan decisions confirm that a public utility activity is limited to providing essential services, not the selling of goods in ordinary commerce. In *Swan* v. *Williams,* 2 Mich. 427 (1852) a utility was described as a private business whose object is to provide services essential to the people which the state would otherwise have to provide. 2 Mich. 427, 435. In *Ten Broek* v. *Miller,* 240 Mich. 667 (1927), a company was denied the right to cut off electric and water service to a customer because he refused to install a septic tank. The basis of the decision

was that the providing of water was such an essential service that it could not be made conditional.

In *Toebe* v. *City of Munising,* 282 Mich. 1, 6, 275 NW 244 (1937) the defendant city was denied the right to continue in the business of selling coal despite its authority to ". . . operate any public utility." because the sale of coal was not an essential service. Accord, *Baker* v. *City of Grand Rapids,* 142 Mich. 687, 106 NW 208 (1906)

In our system of free enterprise and private property one can, and indeed must, quarrel with a utility's extension of its monopoly to a nonessential activity. Were Edison to undertake a rate structure that included the collection of the price of electric motors, stoves, refrigerators and all manner of appliances with related distribution of these items, the sharp distinction between that aspect of its activity dealing with essential services and that aspect of its activity which constituted an unnecessary intrusion into private, free enterprise becomes readily apparent.

The question of whether light bulb distribution is a utility function has been examined in other states. In Massachusetts, Connecticut, Illinois and Wisconsin, a light bulb distribution program such as Edison's has been found to be an unreasonable and unlawful extension of a utility's monopoly. It has been consistently held that such ventures constitute unreasonable extensions of the monopoly of electric utilities to private business.

As long ago as 1932, at the behest of a dissatisfied customer, the Illinois courts invalidated a light bulb service similar to defendant Edison's which had been approved by the Illinois Commerce Commission. *Consumers' Sanitary Coffee & Butter Stores* v. *Illinois Commerce Com-*

mission, 348 Ill. 615, 181 N.E. 411 (1932). The Illinois Supreme Court condemned the service on two primary grounds:

> "(R)ate 'A2' gives to [the utility] a practical monopoly of the lamp business among its customers to the detriment of other dealers. Such monopoly is unlawful.
> . . .
> Another reason for holding rate 'A2' unlawful is that, even if a consumer should buy his lamps from a department store, he would nevertheless be compelled to pay appellant the lamp charge under rate 'A2'. This is an unreasonable provision and results in a violation of the consumer's right to purchase to his advantage and where he desires." *Consumers' Sanitary Coffee & Butter Stores* v. *Illinois Commerce Commission,* 348 Ill. at 618-19, 181 N.E. at 412-13.

Regulators in Massachusetts and Wisconsin forced the abandonment of the light bulb program. *Re Customers of Edison Electric Illuminating Co. of Boston,* 5 P.U.R. (N.S.) 369, 386 (Mass. Dep't of Pub. Utilities 1934); *Re Wisconsin Gas & Electric Co.,* 9 P.U.R. (N.S.) 517, 525-26 (Wis. Pub. Serv. Comm'n 1935). The Wisconsin Public Service Commission went so far as to declare:

> "The Commission finds and determines that the company's present lamp renewal practice embodies many inconsistent, inequitable, unreasonable, and discriminatory features and that the discontinuance of lamp renewals is reasonable under the present circumstances." *Re Wisconsin Gas & Electric Co.,* 9 P.U.R. (N.S.) 517, 526 (Wis. Pub. Serv. Comm'n 1935).

See also, *Re Hartford Electric Light Co.,* Dkt. No. 10047, P.U.R. 3d, Annual 1962, at 306 (Dec. 29, 1961).

There is no statute of the State of Michigan which purports to regulate the light bulb business. Edison must show that the distribution of light bulbs falls within the statutory definition of a "public utility" activity in order to use the MPSC approved rate schedule as an antitrust shield. They have not done so. There has been no showing, and Cantor submits there can be no showing, that the distribution of light bulbs is a public utility activity.

2. In addition to the limitation imposed by the definition of a "Public Utility", other Michigan statutes and cases further restrict the authority of the MPSC.

In *Huron Portland Cement Co.* v. *Michigan Public Service Commission,* 351 Mich. 255; 88 N.W.2d 492 (1958), the Michigan Supreme Court, in considering the language of MCLA 460.6, to wit: "The Michigan public service commission is hereby vested *with complete power and jurisdiction to regulate all public utilities . . .*", rejected the argument of MPSC plenary authority.

> "At the outset we will observe that the Michigan public service commission has no common law powers. . . .
> "We turn, then, to the statutory enactments. Appellant first cites to . . . (MCLA 460.6). . . .
> "The broad language, however, furnishes no grant of specific powers. It is an outline of jurisdiction in the commission and does not purport to be more. If, indeed, the general language quoted had the effect of vesting particular, specific powers in the commission, not only would a constitutional question be presented arising from an asserted lack of standards . . . but there would have been no need whatever for the many

> statutes enacted . . . vesting specific powers in the commission." 351 Mich. 255, 262-63; 88 N.W.2d 492, 496-97.

The Court continued by citing MCLA 460.551 et seq. exemplifying the specific statutes which determined MPSC's authority. Id. 263n. Accord, *Detroit Edison* v. *City of Wixom,* 10 Mich. App. 218; 159 N.W.2d 230 (1968) reversed on other grounds 382 Mich. 693.

MCLA 460.551 provides:

> ". . . the transmission and distribution of electricity in or on the public highways, streets and places, the rate of charge to be made to the consumer for the electricity so transmitted and distributed and the rules and conditions of service under which said electricity shall be transmitted and distributed shall be subject to regulation as in this act provided.

MCLA 460.552 provides:

> "The Michigan public utilities commission, hereinafter referred to as 'the commission' *shall have control and supervision of the business of transmitting and supplying electricity* as mentioned in the first section of this act and no public utility supplying electricity *shall put into force any rate or charge for the same* without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or charge." (emphasis supplied).

There is certainly no room in the language of MCLA 460.552 for permitting the MPSC to do other than regulate the transmitting, supplying and setting the rates for electricity. It is clear

that the "conditions of service" being spoken of in MCLA 460.551 concern the transmission of electrict power and nothing else. This follows because MCLA 460.551 states that the matters covered "shall be subject to regulations as in this Act provided". After providing for the setting of rates in MCLA 460.552 the remaining provisions deal with use of streets and alleys, transmission, inspection, processing of complaints and in connection therewith the production facilities, the maintenance of property, and the maintenance of internal accounting systems. There is simply nothing in the Act which by any reasonable construction would give the commission authority to require Edison to distribute light bulbs.[9]

A recent decision in the United States Court of Appeals for the Third Circuit supports the position that general

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[9] By the same token the MPSC has no authority to interfere with *elimination* of the cost of the program from Edison's accounts and *elimination* of the reference in the rate schedule as long as the resulting rate for electricity is reasonable. As a matter of fact, Edison can proceed to obtain this adjustment as it did in 1964, without a public hearing under MCLA 460.6(a).

In 1964, in case no. U-1791, Edison obtained without public hearing, authorization to reduce its rate to commercial users. (332a) The Commission order provided that the lamp program is to be withdrawn to effect the rate reduction. Edison argued below that this 1964 order evidenced the MPSC knowledge of and control over the light bulb program. In fact, the 1964 rate adjustment order shows that the relationship of expenses to rate is the concern of the MPSC in keeping with its limited statutory authority.

statutory grants of authority cannot be used to shield anticompetitive conduct, even when engaged in by governmental agencies. *Duke & Co., Inc.* v. *Foerster, et al.,* No. 74-2047 CCH Trade Cases para. 60, 433, filed August 5, 1975. The Court in the instant case need not go as far as the *Duke* decision to reverse the opinion below because Michigan statutes specifically limit the MPSC, and the conduct here is private.

3. Michigan has delegated its sovereign authority over public utilities to the municipalities, not to the MPSC.

Parker v. *Brown* held that antitrust laws were not to apply to activities directed or commanded by a State in its capacity as a sovereign. 317 U.S. 341, 353. This specific holding supported the result in *Goldfarb* v. *Virginia State Bar Association,* Slip Op. No. 74-70 (decided June 16, 1975 —— U.S. ——, 95 S.Ct. 2004. It was the notion of dual sovereignty within the federal system that required, the Court felt, in *Parker* an exemption for state government activity.

Sovereignty is the power to exercise supreme dominion and authority subject only to the basic compact between the government and the governed. *People ex rel. Attorney General* v. *Tool,* 35 Colo. 225, 86 P. 224, 226 (1905). It is the power to make law, *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347, 29 S. Ct. 511 (1909), and to govern without dependence on any other power, *Chisholm* v. *State of Georgia,* 2 U.S. (Dallas) 419, 455 (1793).

The MPSC is not the recipient of the sovereign power of the State of Michigan over public utilities. Under the Constitution of the State of Michigan as interpreted

frequently by the Michigan Supreme Court, ultimate authority to regulate public utilities in Michigan rests with the municipalities! The Michigan Constitution, since 1908, has reserved to cities, villages and townships *local control* over their streets and alleys. It is from franchises granted by the municipalities to use streets and alleys, not from the state, that Edison obtains its monopoly. The applicable Constitutional provisions which were enacted into the fundamental law in 1908 are now contained in Article VII of the Constitution of 1963. For clarity and ease of reference they are quoted as they appear in the Constitution of 1963:

> "Township Public Utility Franchises. Sec. 19. No organized township shall grant any public utility franchise which is not subject to revocation at the will of the township, unless the proposition shall first have been approved by a majority of the electors of such township voting thereon at a regular or special election. . ."
>
> "Highways, Streets, Alleys, Public Places; Control, Use by Public Utilities, Sec. 29. No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys, or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city, or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government."

"Franchises and licenses, duration, Sec. 30. No franchise or license shall be granted by any township, city or village for a period longer than 30 years."

Edison's rights to operate as a utility are contained in the franchises it receives from the municipalities. The MPSC does not grant franchises, it never has, and it could not do so and in fact, Edison in its answer to the complaint admits that its franchise does not come from the MPSC. (Compare 3a, para. 2 with 21a, para. 2, 54a.) Otherwise, there would be interference with the area of local control over streets and alleys which is specifically the subject of constitutional protection.[10] See, *City of Mt. Pleasant* v. *Michigan Consolidated Gas Company,* 325 Mich. 501, 39 NW2d 49 (1949). Many municipalities have agreed with Edison that rates set by MPSC will be the maximum allowable rate in that community. (54a) The municipalities can take that right away when franchises come up for renewal. Likewise, the municipalities can limit or eliminate Edison's light bulb program even if the MPSC affirmatively decided the program was desirable.

In 1968, Edison claimed that an MPSC's order concerning right-of-ways was superior to a zoning determination by the City of Wixom. *Detroit Edison Company* v. *City of Wixom,* 10 Mich. App. 218, 159 N.W. 2d 230 (1968) rev'd on other grounds, 382 Mich. 673 Edison citing MCLA 460.6 claimed:

[10] Judge Feikens in his opinion cited MCLA 460.502 which requires an electric utility wishing to displace a company already providing service to obtain a certificate of convenience and necessity from the MPSC. MCLA 460.503, which Judge Feikens did not specifically cite, conditions issuance of that certificate upon the newcomer's first having obtained a municipal franchise.

1. "That by statutory grant of authority the public service commission preempted the field of regulation of electric utilities . . ." 10 Mich. App. 218, 223, and
2. That the zoning determination was unlawful.

The Appellate Court, relying on *Huron Portland Cement Co.* v. *Michigan Public Service Commission,* 351 Mich. 255, 88 N.W. 2d 492 (1958) denied Edison's claim of plenary jurisdiction on the MPSC and stated:

"The only specific powers given the commission to regulate the transmission of electricity is the transmission of electricity through highways act, . . . (MCLA 460.551 et seq.) . . . This act however is limited to transmission over public streets, highways and places and therefore does not include plaintiff's transmission over a private right-of-way. . .

. . . We can find no power or provision in the statutes precluding a municipality from enacting reasonable regulations as to electrical utilities. *Detroit Edison Company* v. *City of Wixom, supra,* at pp. 225, 226"

The assertion of plenary authority by the Michigan regulatory agency has been denied when confronted with utility rate provisions of local franchises. *Village of Plainwell* v. *Eesley Light and Power Co.,* 214 Mich. 461, 183 NW 66 (1921); *City of Saginaw* v. *Consumers Power Co.,* 213 Mich. 460, 182 NW 146 (1921); *Consumers Power Co.* v. *Michigan Public Utilities Commission,* 270 Mich. 213, 258 NW 250 (1935);

Any remaining doubt that Section 460.6 is merely a grant of jurisdiction is put to rest by MCLA 460.557 which provides, inter alia:

". . . the commission shall in no case have power to change or alter the price fixed in or regulated

by or under any franchise heretofore or hereafter granted by any city, village or township. . ."

A similar provision is contained in MCLA 460.54. In *City of Mt. Pleasant* v. *Michigan Consolidated Gas Company*, 325 Mich. 501, 515, 39 NW2d 49 (1949), this provision took precedence over an assertion of plenary power under MCLA Sec. 460.6.

Plaintiff has shown that there are a multiplicity of reasons why the sovereignty of the State of Michigan is not involved in creating and maintaining Edison's light bulb program. Reversal here for any one of the reasons suggested will not impose upon the sovereignty of the State of Michigan or the principles of dual sovereignty within our federal system.

III.

EDISON IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

Under Rule 56 of the Federal Rules of Civil Procedure summary judgment should not be granted if, as a matter of law, the moving party is not entitled to the relief it seeks. Cantor has shown that Edison's light bulb program is a private business activity; that several tribunals have found similar programs to fall far outside the limits of a "public utility" activity which might otherwise entitle it to some protection; that the MPSC has never considered the program and therefore cannot be said to have commanded it; that the MPSC lacked the sovereign authority to require the program or clothe it with continuing antitrust immunity. As a matter of law, therefore, Edison is not entitled to summary judgment on grounds of a state action exemption to Cantor's antitrust claims.

CONCLUSION

Cantor respectfully requests this Court to reverse the opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the decision of the trial court below, and remand this case to the District Court for further proceedings on the remaining issues.

Dated Chicago, Illinois, November 20, 1975

Respectfully submitted,

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I.

STATUTORY APPENDIX

Act of Congress, July 2, 1890, Sherman Act c. 647 (26 Stat. 209), Secs. 1, 2 (15 U.S.C. Secs. 1, 2):

§ 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Frovided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of Congress, Oct. 15, 1914, Clayton Act. c. 323, Sec. 4, Part I, Stat. 730, Sec. 4 (15 U.S.C. Sec. 14):

§ 14.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

IV Michigan Compiled Laws, Chapter 460, Secs. 1, 4, 6, 6a, 54, 501, 502, 503, 551-557:

460.1

Sec. 1. A commission to be known and designated as the "Michigan public service commission" is hereby created, which shall consist of 3 members, not more than 2 of whom shall be members of the same political party,

appointed by the governor with the advice and consent of the senate. Each member shall be a citizen of the United States, and of the state of Michigan, and no member of said commission shall be pecuniarily interested in any public utility or public service subject to the jurisdiction and control of the commission. During his term no member shall serve as an officer or committee member of any political party organization or hold any office or be employed by any other commission, board, department or institution in this state. No commission member shall be retained or employed by any public utility or public service subject to the jurisdiction and control of the commission during the time he is acting as such commissioner, and for 6 months thereafter, and no member of the commission, who is a member of the bar of the state of Michigan, shall practice his profession or act as counselor or attorney in any court of this state during the time he is a member of said commission: Provided, however, This shall not require any commissioner to retire from, or dissolve any partnership, of which he is a member, but said partnership, while he is a member of the commission, shall not engage in public utility practice. Immediately upon the taking effect of this act, the offices of the present members of the Michigan public service commission are hereby abolished, and the members of the Michigan public service commission as herein created shall be appointed by the governor with the advice and consent of the senate, for terms of 6 years each: Provided, That of the members first appointed, 1 shall be appointed for a term of 2 years, 1 for a term of 4 years, and 1 for a term of 6 years. Upon the expiration of said terms successors shall be appointed with like qualifications and in like manner for terms of 6 years each, and until their successors are appointed and qualified. Vacancies shall be filled in the same manner as is provided for appointment in the first instance. As amended P.A. 1951, No. 275, § 1, Eff. Sept. 28.

460.4

Sec. 4. The Michigan public utilities commission, having failed and refused to properly carry out the legislative mandates with respect to public safety, and having failed and refused to properly enforce the provisions of the several acts conferring jurisdiction upon it with respect to the use of he various highways of the state in a safe and proper manner, is hereby abolished, and immediately upon the taking effect of this act said Michigan public utilities commission shall cease to exist, and the tenure of office of the members thereof and other employment of each employe of said commission shall be thereby terminated. All the rights, powers, and duties vested by law in said Michigan public utilities commission, and in the Michigan railroad commission and transferred to the Michigan public utilities commission, shall be deemed to be transferred to and vested in the Michigan public service commission hereby created, and shall hereafter be exercised and performed by said commission. All hearings, matters and proceedings of whatsoever nature pending before said Michigan public utilities commission or any court shall not be terminated or abated, but shall be considered to have been transferred to the Michigan public service commission hereby created, and shall be continued, carried on and completed in the same manner and subject to the same rights, privileges, immunities and procedure as though the same were carried on and completed by said Michigan public utilities commission, without any requirement of amendment, modification, or change by reason of the transfer hereby made. Said Michigan public service commission shall have and exercise all rights and privileges and the jurisdiction in all respects as has been conferred by law and exercised by the Michigan public utilities commission under the laws of this state; and wherever reference is or has been made in any law to the "commission" or to the "Michigan public utilities commission" or the "Michigan railroad commission" such reference shall be construed to mean the Michigan public service commission hereby provided for, without further amendment or change thereof. Any order or decree of the Michigan

public service commission shall be subject to review in the manner now provided by law for reviewing orders and decrees of the Michigan railroad commision or the Michigan public utilities commission. In no case, however, shall any injunction or other order issue suspending or staying any decree or order of the Michigan public service commission except after due notice to the commission and a reasonable opportunity for hearing thereon. All appeals from orders of the Michigan public utilities commission initiated under the provisions of any other act and now pending in any court shall not be dismissed, terminated, or abated but shall be continued, carried on, and completed exactly as though this section had been in effect at the time such appeals were taken and such appeals initiated under the provisions of this section. The Michigan public service commission shall be substituted as defendant in all such causes.

460.6

Sec. 6. Powers and jurisdiction. The Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all public utilities in the state except any municipally owned utility and except as otherwise restricted by law. It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies, whether private, corporate or cooperative, gas companies, water, telephone, telegraph, oil, gas and pipeline companies motor carriers, and all public transportation and communication agencies other than railroads and railroad companies.

Railroads. The Michigan public service commission shall have the same measure of authority with respect to railroads and railroad companies as is granted and con-

ferred under the various provisions of the statutes creating the Michigan railroad commission and its successor, the Michigan public utilities commission, and defining their powers over utilities.

Construction and operation of gas service and pipe line facilities. It may make reasonable rules and regulations to provide for the protection of the public in the construction and operation of facilities by public utilities rendering gas service and by companies operating a pipe line or lines for the transportation of gas, or any petroleum products that are gases at normal atmospheric temperatures and pressures: Provided, however, That such power and jurisdiction shall not extend to field gathering lines in either gas producing fields or gas storage fields except as such lines may cross state trunkline highways or railroads. As amended P.A.1952, No. 240, § 1, Eff. Sept. 18; P.A.1960, No. 44, § 1, Imd. Eff. April 19.

460.6a

Sec. 6a. When any finding or order is sought by any gas, telephone or electric utility to increase its rates and charges or to alter, change or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected. When such utility shall have placed in evidence facts relied upon to support its petition or application to so increase its rates and charges, or to so alter, change or amend any rate or rate schedules, the commission, pending the submission of all proofs by any interested parties, may in its discretion and upon written motion by such utility make a finding and enter an order granting partial and immediate relief, after first having given notice to the interested parties within the service area to be affected in the manner ordered by the commission, and after having afforded to such interested parties reasonable opportunity for a full and complete hearing: Provided, That no such finding or order shall be authorized or approved ex parte, nor until the commission's technical staff has made an investigation and report: And provided further, That any alteration or

amendment in rates or rate schedules applied for by any public utility which will result in no increase in the cost of service to its customers may be authorized and approved without any notice or hearing. Nothing contained in this section shall be construed to prohibit the commission from permitting the incorporation of fuel adjustment clauses in rate schedules for service other than domestic service pursuant to notice and hearing thereon. P.A.1939, No. 3, § 6a, added by P.A.1952, No. 243, § 1, Eff. Sept. 18, 1952, as amended P.A.1955, No. 172, § 1, Imd. Eff. June 13.

460.54

Sec. 4. In addition to the rights, powers and duties vested in and imposed on said commission by the preceding section, its jurisdiction shall be deemed to extend to and include the control and regulation, including the fixing of rates and charges, of all public utilities within this state, producing, transmitting, delivering or furnishing steam for heating or power, or gas for heating or lighting purposes for the public use. Subject to the provisions of this act the said commission shall have the same measure of authority with reference to such utilities as is granted and conferred with respect to railroads and railroad companies under the various provisions of the statutes creating the Michigan railroad commission and defining its powers and duties. The power and authority granted by this act shall not extend to, or include, any power of regulation or control of any municipally owned utility; and it shall be the duty of said commission on the request of any city or village to give advice and render such assistance as may be reasonable and expedient with respect to the operation of any utility owned and operated by such city or village. In no case shall the commission have power to change or alter the rates or charges fixed in, or regulated by, any franchise or agreement heretofore or hereafter granted or made by any city, village or township. It shall be competent for any municipality and any public utility operating within the limits of said municipality, whether such utility is operating under the terms of a franchise or otherwise, to join in submitting to the commission any question involving the fixing or determination

of rates or charges, or the making of rules or conditions of service, and the commission shall thereupon be empowered, and it shall be its duty to make full investigation as to all matters so submitted and to fix and establish such reasonable maximum rates and charges, and prescribe such rules and conditions of service and make such determination and order relative thereto as shall be just and reasonable. Such order when so made shall have like force and effect as other orders made under the provisions of this act. In any case where a franchise under which a utility is, or has been, operated, including street railways, shall have heretofore expired or shall hereafter expire, the municipality shall have the right to petition the commission to fix the rates and charges of said utility in accordance with the provisions of this act, or to make complaint as herein provided with reference to any practice, service or regulation of such utility, and thereupon said commission shall have full jurisdiction in the premises.

460.501

Sec. 1. The term "municipality", when used in this act, means a city, village or township.

The term "public utility", when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.

The term "commission", when used in this act, means the Michigan public utilities commission or such other state governmental agency as may exercise the powers now conferred upon said commission.

460.502

Sec. 2. No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly,

or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension.

460.503

Sec. 3. Before any such certificate of convenience and necessity shall issue, the applicant therefor shall file a petition with the commission stating the name of the municipality or municipalities which it desires to serve and the kind of service which it proposes to render, and that the applicant has secured the necessary consent or franchise from such municipality or municipalities authorizing it to transact a local business.

460.551

Sec. 1. When electricity is generated or developed by steam, water or other power, within 1 county of this state, and transmitted and delivered to the consumer in the same or some other county, then the transmission and distribution of the same in or on the public highways, streets and places, the rate of charge to be made to the consumer for electricity so transmitted and distributed and the rules and conditions of service under which said electricity shall be transmitted and distributed shall be subject to regulation as in this act provided.

460.552

Sec. 2. The Michigan public utilities commission, hereinafter referred to as "the commission" shall have control and supervision of the business of transmitting and supplying electricity as mentioned in the first section of this act and no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or charge.

460.553

Sec. 3. Any person, firm or corporation engaged or organized to engage in any such business of transmitting and supplying electricity in 1 or more counties of this state shall, with the consent of the duly constituted city, village and township authorities of the cities, villages and townships in or through which it operates or may hereafter propose to operate, have the right to use the highways, streets, alleys and other public places of such cities, villages and townships: Provided, That in all cases each transmission line used shall have insulation and conductivity in accordance with its voltage. In case it has or procures a franchise from any city, village or township or a right to do business therein, it may transact a local business therein. Nothing herein contained shall be construed to impair any right possessed by any village or township to the reasonable control of its streets, alleys and public places in all matters of mere local concern.

460.554

Sec. 4. Every person, firm or corporation erecting any lines for the transmission of electricity in or through the highways, streets or public places of 1 or more counties of this state shall, from time to time, as and when required to do so by the commission, prepare and file with the commission such data and information as shall be required relative to the method and manner of the construction of such lines, the franchise or consent under which said lines were constructed or are being maintained, and such other information as the commission may reasonably require. The commission may require the filing with it of detailed specifications covering the type of construction of such lines. Such specifications shall show the details of construction of lines of various voltages; and after such specifications have been approved by the commission, all lines built by such person, firm or corporation must be constructed according thereto. The height of such lines at all highway crossings shall be not less than 22 feet; and at railroad crossings shall be in accordance with the regulations of the commission made under authority of law.

The commission shall have the right to require all poles used in the transmission of electricity as aforesaid, to be stenciled or otherwise marked with the name of the owner thereof.

460.555

Sec. 5. The commission shall have the power to inspect and examine all such electrical apparatus already installed in any public highways, streets or places and all such apparatus hereafter installed, and to investigate from time to time the method employed by persons, firms or corporations transmitting and supplying electricity, and shall have power to order such improvements in such method as shall be necessary to secure good service and the safety of the public and of those employed in the business of transmitting and distributing such electricity, and of any persons liable to be injured by the erection, maintenance and use of such apparatus.

460.556

Sec. 6. The commission shall have power in its discretion to order electric current for distribution to be delivered at a suitable primary voltage, to any city, village or township through which a transmission line or lines may pass; to order service to be rendered by any such electric utility in any case in which it will be reasonable for such service to be ordered; prescribe uniform methods of keeping accounts to be observed by all persons, firms or corporations engaged in such business of transmitting and supplying electricity, and to keep informed as to the methods employed by all electric utilities in the transaction of their business; and to see that their property is maintained and operated for the security and accommodation of the public and in compliance with the provisions of law. It shall have power to require of such persons, firms or corporations annually a verified report upon such form and giving such information as will enable the commission to better discharge the duties imposed upon it hereby; and shall also have power to require from all electric utilities in the state such information as the commission may need

at any time in connection with the performance of the duties imposed upon it by this act. Said commission shall also have power, in connection with any rate or service hearing or investigation, to make such audit and analysis of the books and records of the utility, and such inventory and appraisal of its property as may be necessary in connection with the duties imposed upon the commission by this act; and in any such case the commission shall keep a record of all expenses incurred by it in connection with its investigation of the affairs and property of the said utility and during the progress or at the conclusion of its work, shall state the amount thereof in writing to the said utility and said utility shall pay into the treasury of the state the amount of such expense at such times and in such manner as the commission may by order require. Said moneys when so paid into the state treasury shall go to the credit of the Michigan public utilities commission, and are hereby appropriated to the payment of its expenses.

460.557

Sec. 7. Upon complaint in writing by any consumer or city, village, or township, by its duly constituted common or village council or township board, or other duly constituted authority of such city, village or township, relative to the price of the electricity sold and delivered in such municipality, or with reference to the service rendered or any other matter of complaint, the commisison shall investigate such complaint and may by its agents, examiners, inspectors, engineers and accountants inspect the system and method used in transmitting and supplying electricity and examine or cause to be examined the books and papers of such person, firm or corporation pertaining thereto. The commission shall cause notices of such complaint with a copy thereof to be served on the person, firm or corporation complained of or affected thereby which shall have a right to be heard in respect to the matter complained of at a convenient time and place to be fixed in such notice. After such investigation and hearing, the commission within lawful limits may by order fix the price of elec-

tricity to be charged by such person, firm or corporation, and the price so fixed, of which such person, firm or corporation shall have notice, shall be the price to be charged until the commission shall again fix the price to be charged therefor. Said commission may also by order establish such rules and conditions of service as shall be just and reasonable. In determining the proper price, the commission shall consider and give due weight to all lawful elements properly to be considered to enable it to determine the just and reasonable price to be fixed for supplying electricity, including cost, reasonable return on the fair value of all property used in the service, depreciation, obsolescence, risks of business, value of service to the consumer, the connected load, the hours of the day when used and the quantity used each month: Provided, however, That the commission shall in no case have power to change or alter the price fixed in or regulated by or under any franchise heretofore or hereafter granted by any city, village or township: Provided further, Where identical or substantially identical rates prevail or are established, or shall hereafter be established in 2 or more contiguous municipalities or communities served or whose inhabitants are served by the same person, firm or corporation, the territory so served and to be served shall be treated as a unit for the purpose of fixing rates and no such rate or rates shall be changed with respect to 1 or more of such municipalities or communities so as to establish any difference of rate within the territory so served, unless and until it shall be shown that the continuance of such identical or substantially identical rate or rates will work substantial hardship to some municipality or person, firm or corporation affected thereby. The prices, rates and charges of every electric utility shall be just and reasonable and no consumer shall at any time be charged more or less than other consumers are charged for like contemporaneous service rendered under similar circumstances and conditions, and if any electric utility doing business within this state shall directly or indirectly by any special rate, rebate, draw-back or other device, charge, demand, collect or receive from any person or persons,

copartnership or corporation, a greater or less compensation for any service rendered, furnished or performed, than it charges, demands, collects or receives from any other person, or persons, copartnership or corporation, for rendering, furnishing or performing for him or them a like contemporaneous service, such electric utility shall be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. It shall further be unlawful for any person, copartnership or corporation, directly or indirectly to ask, demand or accept any rebate, drawback or other device whereby he or they shall obtain electric service for any less rate than that charged others in like circumstances. The provisions of Act No. 419 of the Public Acts of Michigan for the year 1919, shall, so far as applicable, govern the hearings before the said commission herein provided for, and the commission shall have power and authority to make, adopt and enforce rules and regulations for the conduct of its business and the proper discharge of its functions hereunder, and all persons dealing with the commission or interested in any matter or proceeding pending before it shall be bound by such rules and regulations. The provisions of Act No. 300 of the Public Acts of 1909, as amended and now in force, shall apply as to appeals from any order of the commission to the circuit court and from the circuit court to the supreme court.

Michigan Constitution, Article VII, Secs. 19, 29, 30:

Township Public Utility Franchises, Sec. 19. No organized township shall grant any public utility franchise which is not subject to revocation at the will of the township, unless the proposition shall first have been approved by a majority of the electors of such township voting thereon at a regular or special election.

Highways, Streets, Alleys, Public Places; Control, Use by Public Utilities, Sec. 29. No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys, or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Franchises and Licenses, Duration, Sec. 30. No franchise or license shall be granted by any township, city or village for a period longer than 30 years.